IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

NO. 80-5942

TONY B. AMADEO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether "lack of knowledge" is an insufficient showing of "cause" under Francis v. Henderson, 425 U.S. 536 (1976) to exempt the Petitioner from the Georgia procedural rule requiring a timely challenge to the array of the grand and petit juries.

PART ONE

STATEMENT OF THE CASE

Petitioner, Tony B. Amadeo, was convicted in the Superior Court of Putnam County, Georgia of the offense of murder and of criminal attempt to commit theft. Petitioner received the death penalty on the charge of murder and received a ten year sentence on the charge of criminal attempt to commit theft. A motion for new trial was filed on Petitioner's behalf on December 21, 1977, but was overruled by the Superior Court of Putnam County on September 18, 1978.

Petitioner filed a notice of appeal on October 17, 1978 to the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the Petitioner's convictions and sentences in Amadeo v. State, 243 Ga. 627 (1979). Following the submission of briefs on his direct appeal, Petitioner obtained new counsel, who raised new issues for the consideration of the Supreme Court of Georgia. A motion for rehearing was filed on behalf of the Petitioner, raising these new issues and these issues were considered, but rejected, by the Supreme Court of Georgia in its opinion denying the Petitioner's motion for rehearing on May 29, 1979.

A petition for a writ of certiorari was docketed in this Court on August 27, 1979. The petition was denied on November 26, 1979. A petition for rehearing was denied on January 21, 1980. In his previous petition for certiorari, Petitioner raised the issue now presently before this Court in his second petition for a writ of certiorari.

Following the denial of his petition for a writ of certiorari, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Putnam County, Georgia. Petitioner raised the issue now before this Court, as well as one additional issue. The Superior Court of Putnam County, Georgia denied relief based on Petitioner's allegations in its order of February 29, 1980. The Superior Court of Putnam County noted the previous decision of the Supreme Court of Georgia deciding the jury issue and declined to consider it further.

Petitioner then filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia. This application was denied on September 10, 1980, with a motion for rehearing being denied on September 24, 1980. It is from this denial of the application for a certificate of probable cause that the Petitioner now seeks review.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

PETITIONER'S ALLEGATION OF "LACK OF KNOWLEDGE" DOES NOT EXEMPT HIM FROM THE GEORGIA PROCEDURAL RULE REQUIRING A TIMELY CHALLENGE TO THE ARRAY OF THE GRAND AND PETIT JURIES AND THE GEORGIA SUPREME COURT PROPERLY DETERMINED THAT PETITIONER'S JURY CHALLENGES WERE UNTIMELY.

Petitioner asserted as his Fourth Enumeration of Error to the Supreme Court of Georgia in his direct appeal and to the Superior Court of Putnam County, Georgia in his state habeas corpus petition, that the jury box, as it existed in Putnam County, Georgia at the time of the Petitioner's trial, was unconstitutionally composed. In his appeal to the Supreme Court of Georgia, as well as in his present petition for certiorari, Petitioner alleges that it has been shown that the jury box in Putnam County, Georgia is unconstitutionally composed based on the decision of the United States District Court for the Middle District of Georgia, Macon Division in Willie Bailey, et al. v. Roy L. Vining, et al., decided August 17, 1978, Civil Action No. 76-199-MAC.[1/] In that case, the United States District Court

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[1/] As previously noted, this issue was also raised in Petitioner's prior petition for a writ of certiorari, No. 79-5255.

for the Middle District of Georgia found that the jury box that then existed in Putnam County was unconstitutionally composed and could not be further utilized. (A copy of the order of the court and a portion of the evidentiary hearing in this District Court are attached as Appendix "B" and "C" to the Petitioner's petition for a writ of certiorari).

However, even when faced with the decision of the United States District Court for the Middle District of Georgia, finding that the jury box in Putnam County was unconstitutionally composed, the Supreme Court of Georgia determined that Petitioner's challenge to the jury composition "comes too late." The state habeas corpus court noted the Supreme Court of Georgia decision and declined to consider the issue further.

In reaching its decision that Petitioner's jury composition claims should be barred on direct appeal due to their untimeliness, the Georgia Supreme Court cited various Georgia cases including, Goodwin v. Hopper, 243 Ga. 193 (1979), for the proposition that challenges to jury composition are waived, unless they are challenged prior to indictment. In Goodwin v. Hopper, supra, the Supreme Court of Georgia held that the failure to challenge the arrays of the grand and traverse juries, alone, was not a ground for ineffective assistance of counsel or "cause" within the meaning of Ga. Code Ann. § 50-127(1). The Georgia Supreme Court in Goodwin v. Hopper, supra, cited the decision of the United States Supreme Court in Francis v. Henderson, 425 U.S. 536 (1976). Similarly, the failure of the Petitioner's trial counsel to challenge the arrays of the grand and traverse jury is not either a ground of ineffective assistance of counsel or "cause" under Francis v. Henderson, supra.

Petitioner now argues in this Court that there was no waiver of his right to challenge the composition of the grand and petit juries because he had "no opportunity to discover purposeful discrimination." The general rule of Georgia procedure, as noted above, has long required a defendant to make a jury challenge at, or before, the time the jury is "put upon him." E.g., Ga. Code Ann. § 59-803; Cobb v. State, 218 Ga. 10, 21-22 (1962); Williams v. State, 210 Ga. 665, 667 (1954), remanded, 349 U.S. 375 (1955), reaffirmed, 211 Ga. 763, 88 (1955), cert. denied, 350 U.S. 950 (1956); and Heard v. State, 210 Ga. 523 (1954). However, Georgia procedure, as well as federal procedure, recognizes a "cause" exception to this timeliness requirement. See Simmons v. State, 226 Ga. 110 (1970).

The controlling case under federal law concerning whether failure to comply with procedural requirements for jury challenges acts as a waiver of a defendant's right to make such challenges, is Francis v. Henderson, 425 U.S. 536, 542 (1976). In Francis v. Henderson, supra, it was held that a federal habeas corpus petitioner must establish "not only a showing of 'cause' for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of "actual prejudice," in order to raise jury composition issues without complying with the timeliness requirements of state law.

Recent decisions of the Court of Appeals for the Fifth Circuit have emphasized that in order to raise the issue of the composition of grand and petit juries in a federal habeas corpus proceeding a petitioner who has failed to comply with the state's procedural requirements for jury challenges, must establish both cause and actual prejudice. See Tennon v. Ricketts, 574 F.2d 1243, 1245 (5th Cir. 1978); Evans v. Maggio, 557 F.2d 430, 434 (5th Cir. 1977);

Dennis v. Hopper, 548 F.2d 589, 590-591 (5th Cir. 1977); Wright v. Wainwright, 537 F.2d 224, 226 (5th Cir. 1976). Therefore, it is submitted that under Francis v. Henderson, supra, and under Georgia procedure as set forth in such cases as Simmons v. State, 226 Ga. 110 (1970), the Petitioner must show both "cause" and "prejudice" in order to exempt himself from the Georgia timeliness rule concerning jury challenges. Again, Petitioner's allegation is that he did not waive his right to object to the jury composition of the grand and petit jury in Putnam County, because he had no opportunity to discover purposeful discrimination.

The Petitioner cited the case of Barrow v. State, 239 Ga. 162(1) (1977) in support of his position to the Georgia Supreme Court and now cites it to this Court. However, the Supreme Court of Georgia properly found that Barrow v. State, supra, was distinguishable from the instant case. Petitioner now seeks to cite Barrow v. State, supra, for the proposition that failure to timely raise a challenge to the arrays of the grand and petit jury, may not be deemed a waiver under special circumstances. In distinguishing Barrow v. State, supra, from the instant case, the Supreme Court of Georgia found that the special circumstances occurring in Barrow, were not present in the instant case.

The Supreme Court of Georgia in its decision in Petitioner's case on direct appeal, noted a major distinguishing factor between Barrow v. State, supra, and the Petitioner's case. This factor was that Barrow's conviction and sentence had been set aside on appeal, and at the time of Barrow's new trial, he filed and pursued timely challenges to the arrays and when they were denied, brought his case back to the court by means of an interlocutory appeal, prior to trial and conviction. The Georgia

Supreme Court held that Petitioner's case was one of many cases in which a defendant takes his chances by not challenging the arrays of the grand and traverse juries and then attempts to challenge the arrays after conviction. The Georgia Supreme Court specifically held that this trial tactic was precluded by both Georgia case law in such cases as Goodwin v. Hopper, 243 Ga. 193 (1979) and by federal case law, Francis v. Henderson, 425 U.S. 536 (1976). The Georgia Supreme Court's decision finding that no special circumstances existed in the Petitioner's case to allow him to be exempted from the waiver rule regarding jury challenges, was correct and in accord with both state and federal law.

Petitioner first alleges that he should not be foreclosed from making his jury challenge by the waiver principle, because although the jury list was non-representative, the percentages on that list would not be sufficient to make out a prima facie case of jury discrimination, solely on percentages. Petitioner argues that the disparity on the basis of percentage was in the area of fourteen percent and since this would not make out a prima facie case of discrimination on the basis of race, his counsel was correct in declining to make a jury challenge at the time of trial. It should be noted that this Court in Alexander v. Louisiana, 405 U.S. 625, 630 (1972), stated in relation to racial discrimination in jury composition:

> "This Court has never announced a mathematical standard for the demonstration of 'systematic exclusion of blacks' but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors."

Therefore, the mere fact that a certain percentage of blacks were included on the jury lists, would not mean that a challenge to the jury composition was unnecessary, nor that any such challenge might not have been successful, as there are no set percentages for showing a prima facie case of discrimination. Instead, an attorney must, under Alexander v. Louisiana, supra, take into account all possible explanatory factors.

Secondly, Petitioner alleges that no matter how effective his attorneys were, they could not have known of this defect in the jury selection process until it was discovered in the federal proceeding. Petitioner alleges that there was "no means to discover" this defect and that it would have been impossible to discover it prior to trial. However, as this defect was subsequently uncovered in the federal proceeding, it is difficult to make a finding that it was undiscoverable, even if it was not a matter of public record.

Petitioner argues that placing the burden on his attorney to discover this discriminatory factor in a hearing, would lead to the conclusion that all attorneys would have to bring jury challenges in each case. This conclusion is unwarranted. All that is required is that the attorney consider all possible factors in determining whether or not to make a challenge. The mere fact that making the type of challenge required in this case might have been a lengthy and extensive process, does not prevent the failure to make this challenge from waiving the Petitioner's right to challenge the jury composition at a later date.

Petitioner argues that if defense attorneys and defendants are deemed to have waived such "hidden issues" by the failure to timely raise such issues, there is an increased burden on the administration of justice. Not requiring defense attorneys and defendants to fully investigate possible bases for making jury challenges, but rather allowing them to sit back and wait to see if any such defects surface, would also increase the burden on the administration of justice, by allowing such issues to be raised after trial or in a collateral attack, even if they were not raised at the original trial. This would also allow the use of the trial tactic condemned by the Supreme Court of Georgia in its decision in Petitioner's direct appeal, by means of which defense attorneys take their chances with unchallenged grand and traverse juries and then attempt to challenge the arrays of these juries after conviction.

Petitioner's final argument is that the fact that this case involved the imposition of the death penalty, sets it apart from other cases in which it is determined that a waiver of the right to make a challenge to the grand and petit juries, has been made. Respondent asserts that the fact that this is a death penalty case, does not dispense with the "cause" and prejudice requirement of Francis v. Henderson, 425 U.S. 536 (1976). The standard of waiver should be and is, the same for all cases in which the issue arises.

It need not be decided whether in this particular case there was intentional discrimination in the composition of the grand and petit juries involved in the Petitioner's case, as Petitioner under the cause and prejudice standard of Francis v. Henderson, supra, has not shown any special circumstances which

would prevent his failure to challenge the composition of these juries from being held to be a waiver of his right to make such challenges. The Supreme Court of Georgia properly dealt with this issue on Petitioner's direct appeal and declined to reconsider it by denying Petitioner's application for a certificate of probable cause to appeal from the denial of state habeas corpus relief.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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TONY B. AMADEO, :

Petitioner :

V. : CASE NUMBER 80-5942

EUGENE RUSSEAU, SHERIFF, :

Respondent :

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, TONY B. AMADEO, who is now confined to the Putnam County Jail in Eatonton, Georgia, and who is under a sentence of death, asks leave to file the attached Petition for Writ of Certiorari to the United States Supreme Court without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's Affidavit in support of this motion is attached hereto.

GARLAND, NUCKOLLS & CATTS, P.C.

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IN THE SUPREME COURT

FOR THE UNITED STATES

TONY B. AMADEO, :

Petitioner :

V. : CASE NUMBER _____

:

Respondent :

PAUPER'S AFFIDAVIT

TONY B. AMADEO, Petitioner, being duly sworn, deposes and says:

(1) I am a citizen of the United States and the Petitioner in the above-entitled action.

(2) I desire to prosecute a review of the judgment entered by the Supreme Court of the State of Georgia on September 10, 1980, and affirmed on rehearing on September 24, 1980, pursuant to 28 U.S.C. §1257(3), but because of my poverty, I am unable to pay the costs of such a review.

(3) I believe I am entitled to the redress I seek by such a review, and that such a review presents substantial issues of deprivation of rights secured by the Constitution of the United States.

The nature of the question to be presented upon such a review is as follows:

WHETHER THE ENTIRE JURY LIST INVOLVED IN PETITIONER'S INDICTMENT AND TRIAL, BOTH GRAND AND PETIT, WAS UNCONSTITUTIONALLY COMPOSED IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

I contend that the Supreme Court of Georgia erred in upholding my conviction and sentence.

WHEREFORE, Affiant prays that he may have leave to proceed in this Court on Petition for Writ of Certiorari in forma pauperis.

Tony B. Amadeo
TONY B. AMADEO

Sworn to and subscribed
before me this 19th day
of December, 1980.

Wm M. Warner
Notary Public

Notary Public, Georgia State at Large
My Commission Expires [illegible] 1982